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16 Attorney for the Defendant:  
17 SILVERSTEIN EVICTION LAW OFFICES

18  
19 **UNITED STATES DISTRICT COURT**  
20  
21 **CENTRAL DISTRICT OF CALIFORNIA – SANTA ANA**  
22  
23

24 RONALE BEA-MOORE

CASE NO: 8:17- cv-550-JLS  
(DFMx)

25 Plaintiff, **TRIAL BRIEF**

26 vs.

Judge: Josephine L. Station  
Courtroom: 10A

27 SILVERSTEIN EVICTION LAW  
28 OFFICES

**Trial Date: November 13, 2018**  
**Time: 8:00 a.m.**

Defendant.

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1 Defendant, Silverstein Eviction Law Offices “Silverstein” submits this Trial Brief  
2 in support of entering judgment in favor of Silverstein.  
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6 **STATEMENT OF THE FACTS OF THIS CASE**  
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9 Plaintiff, Ronale Bea-Moore “Bea” was a tenant at a residential property.  
10 Silverstein was the attorney for Bea’s Landlord and filed an unlawful detainer  
11 action against Bea for nonpayment of rent at the premises.  
12

13 Bea claims that he never received a three-day notice for non-payment of rent  
14 (per statement at his deposition). Bea further claims that the first time that the  
15 saw the three-day notice was when he received the Summons and Complaint for  
16 unlawful detainer. Bea filed a Fair Debt Collection Practices Act “FDCPA”  
17 against Silverstein based upon the original three-day notice for nonpayment of rent  
18 claiming that the three-day notice was a ‘communication” under the provisions of  
19 the FDCPA.  
20  
21  
22

23 Bea brought this action against “Silverstein” under FDCPA *15 U.S.C. §§*  
24 *1692e, 1692e(2)(A), 1692e(2)(B), 1692f(1) and 1692g(a)(1)*, and sought damages  
25 as allowed under *1692k(a)(1), (2) and (3)* which prohibits debt collectors from  
26 engaging in abusive, deceptive and unfair practices.  
27  
28

1 The issues remaining before the court are whether Defendant violated the  
2 FDCPA and if plaintiffs is entitled to statutory damages of up to \$1,000.00 as  
3 allowed by §1692k based upon violations under the FDCPA.  
4

5  
6 **MEMORANDUM OF POINTS AND AUTHORITIES**  
7

8  
9 Plaintiffs brought this action under FDCPA *15 U.S.C. §§ 1692e*.  
10 *1692e(2)(A), 1692e(2)(B), 1692f(1) and 1692g(a)(1)*, and sought damages as  
11 allowed under § 1692k(a)(1), (2) and (3). which prohibits debt collectors from  
12 engaging in abusive, deceptive and unfair practices.  
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14

15 The issues remaining before the court are whether Defendant violated the  
16 FDCPA and if plaintiffs is entitled to statutory damages of up to \$1,000.00 as  
17 allowed by §15 USC1692k based upon violations under the FDCPA.  
18

19 **1**

20 **SILVERSTEIN IS NOT A “DEBT COLLECTOR” UNDER FDCPA**  
21 **NOR WAS THERE ANY “COMMUNICATIONS”**  
22

23  
24  
25 Silverstein is not a “debt collector” under the FDCPA. The burden of  
26 proof to determine if Silverstein is a debt collector is on Bea. Bea did not meet  
27 his burden. *Acosta v James A. Gustino PA 646 Fed Apps 723(11<sup>th</sup> Circuit) 2016*  
28

1 In *Goldstein v Hutton, Ingram, Yurzel, Gainen, Carroll & Bertolotti* 374  
2 *F.3d 56 2<sup>nd</sup> Circuit, 2014*, the Court reviewed five factors to consider:

- 3 1) The number of collection cases  
4  
5 2) The frequency of collection cases  
6  
7 3) The pattern of collection communications  
8  
9 4) Staff and systems assigned for collection work  
10  
11 5) An ongoing relationship with the creditor.

12 In addition, a "debt collector" under the FDCPA is (1) "any person who  
13 uses any instrumentality of interstate commerce or the mails in any business the  
14 principal purpose of which is the collection of any debts," or (2) "who regularly  
15 collects or attempts to collect, directly or indirectly, debts owed or due or asserted  
16 to be owed or due another." *15 U.S.C. § 1692a(6); Schlegel v. Wells Fargo Bank,*  
17 *NA (In re Schlegel), 720 F.3d 1204 (2013)* In the case before this Court,  
18 Silverstein **did not** use any instrumentality of interstate commerce or the mails in  
19 any business the principal purpose of which is the collection of any debts. In  
20 addition, the purpose of Silverstein's unlawful detainer actions was to obtain  
21 possession and in ancillary action obtain a judgment for rent **only** when his clients  
22 asked for it.  
23  
24  
25

26 in fact, if the law was that every lawsuit's prayer actually asked for money  
27 or damages, most attorneys would be subject to the act if the complaint asked for  
28

1 damages by Attorney was a “consumer”. The law differentiates between an  
2 attorney debt collector against a consumer for damages asked for in a complaint  
3 against a “consumer” under FDCPA.  
4

5 There is no evidence that the 3-day notice was served by mail or in interstate  
6 commerce. The FDCPA does not apply to the facts of this case nor the California  
7 provisions of the Act.  
8

9 There was no statutory “commination” under the act. The inclusion of the  
10 3-day notice in the complaint for unlawful detainer action was the time that Bea  
11 saw the 3-day notice which was an exhibit and not a communication by itself.  
12

13 See *15 USC Section 1692a (2)*  
14

15  
16 *In Medialdea v. Law Office of Evan L Loeffler PLLC, 2008 U.S. Dist. LEXIS*  
17 *109013*, the court held,  
18

19 The tenants claimed that the violations occurred during the course of  
20 litigation over attorney's fees and costs. The court granted the firm's motion in part.  
21 The CPA claims failed because a court proceeding did not constitute trade or  
22 commerce under Wash. Rev. Code §§ 19.86.020 and 19.86.090 of the CPA.  
23 Further, the tenants paid no more than the amount that the state court found  
24 appropriate and consequently suffered no actual damages. As to the FDCPA  
25 claims, the court held that the fees and costs did qualify as debts under 15 U.S.C..  
26  
27  
28

1 §§ 1692f(1) and 1692a(5) because they resulted from litigation efforts to enforce  
2 rental agreements. Further, the FDCPA did apply to litigation activities, and the  
3 common law litigation privilege did not protect the firm from such claims. The  
4 court found that the claims brought under § 1692f and 15 U.S.C.S. § 1692e(5)  
5 failed to state claims because the filing of a lawsuit alone was neither unfair nor  
6 unconscionable. The court did find that Tenant #1 sufficiently stated a claim under  
7 § 1692e(2) because in requesting a service cost and utilities costs that were later  
8 denied, the representations about the amount of debt were false and violated he  
9 FDCPA..  
10  
11  
12

13  
14  
15 The court granted without prejudice the motion to dismiss in part as to all  
16 plaintiffs' claims under § 1692e(5) and § 1692f, the claims of Tenants #2 under §  
17 1692e(2), and all claims brought under the CPA. The court denied the motion as to  
18 the claims under § 1692e(2) of Tenant #1.”  
19  
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22 Bea claims that he never received a three-day notice for non-payment of  
23 rent. Bea further claims that the first time that he saw the three-day notice was  
24 when he received the Summons and Complaint for unlawful detainer. Bea filed a  
25 Fair Debt Collection Practices Act “FDCPA” against Silverstein based upon the  
26 three-day notice.  
27  
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Under *Ca. Civil. Code § 1788.17*

Notwithstanding any other provision of this title, every debt collector collecting or attempting to collect a consumer debt shall comply with the provisions of Sections 1692b to 1692j, inclusive, of, and shall be subject to the remedies in Section 1692k of, Title 15 of the United States Code. However, subsection (11) of Section 1692e and Section 1692g shall not apply to any person specified in paragraphs (A) and (B) of subsection (6) of Section 1692a of Title 15 of the United States Code or that person's principal. The references to federal codes in this section refer to those codes as they read January 1, 2001.\

#### § 1692a. Definitions

As used in this title [15 USCS §§ 1692 et seq.]--

- (1) The term "Bureau" means the Bureau of Consumer Financial Protection.
- (2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.
- (3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.
- (4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.
- (5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family,



1 or household purposes, whether or not such obligation has been reduced to  
2 judgment.

3 **(6)** The term "debt collector" means any person who uses any instrumentality of  
4 interstate commerce or the mails in any business the principal purpose of which is  
5 the collection of any debts, or who regularly collects or attempts to collect, directly  
6 or indirectly, debts owed or due or asserted to be owed or due another.

7 Notwithstanding the exclusion provided by clause (F) of the last sentence of this  
8 paragraph, the term includes any creditor who, in the process of collecting his own  
9 debts, uses any name other than his own which would indicate that a third person is  
10 collecting or attempting to collect such debts. For the purpose of section 808(6) [15  
11 USCS § 1692f(6)], such term also includes any person who uses any  
12 instrumentality of interstate commerce or the mails in any business the principal  
13 purpose of which is the enforcement of security interests. The term does not  
14 include--

15 **(A) any officer or employee of a creditor while, in the name of the creditor,**  
16 **collecting debts for such creditor;**

17 **(B) any person while acting as a debt collector for another person, both of**  
18 **whom are related by common ownership or affiliated by corporate control, if**  
19 **the person acting as a debt collector does so only for persons to whom it is so**  
20 **related or affiliated and if the principal business of such person is not the**  
21 **collection of debts;**

22 **(C) any officer or employee of the United States or any State to the extent**  
23 **that collecting or attempting to collect any debt is in the performance of his**  
24 **official duties; (emphasis added)**

25 **(D) any person while serving or attempting to serve legal process on any other**  
26 **person in connection with the judicial enforcement of any debt;**

27 **(E) any nonprofit organization which, at the request of consumers, performs bona**  
28 **fide consumer credit counseling and assists consumers in the liquidation of their**  
debts by receiving payments from such consumers and distributing such amounts  
to creditors; and

**(F) any person collecting or attempting to collect any debt owed or due or asserted**  
to be owed or due another to the extent such activity (i) is incidental to a bona fide  
fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which  
was originated by such person; (iii) concerns a debt which was not in default at the  
time it was obtained by such person; or (iv) concerns a debt obtained by such  
person as a secured party in a commercial credit transaction involving the creditor.

1 (7) The term "location information" means a consumer's place of abode and his  
telephone number at such place, or his place of employment.

2 (8) The term "State" means any State, territory, or possession of the United States,  
3 the District of Columbia, the Commonwealth of Puerto Rico, or any political  
subdivision of any of the foregoing.

4 Under *California Code Section 1788*, Attorneys are not subject to the  
5  
6 *California Code* thus differing liabilities under FDCPA and State Law.

## 8 CONCLUSION

9  
10 The purpose of an unlawful detainer action is to recover possession of the  
11 premises owned by the Landlord. If it was for collection for past rent, it would  
12 not obtain the priority it receives under California law. See *California Code of*  
13 *Civil Procedure, Section 1161(3)* specifically limited 3-day notice for possession

14  
15 The Landlord may demand rent and possession at same time. If a tenant  
16 holds over after rent has become due, and remains unpaid for the space of three  
17 days, the landlord may demand the payment of rent and delivery of possession at  
18 the same time, and on refusal of tenant, can maintain an action for unlawful  
19 holding over. It is not necessary to demand rent and wait three days and then  
20 demand possession. *Brummagim V. Spencer, 29 Cal 661 (1866)*.

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24  
25 As part of the general statutory plan to provide for speedy disposition of  
26 unlawful detainer actions, the trial thereof is entitled to unqualified preference in  
27  
28

1 trial setting *California Code of Civil Procedure* § 1179a. *Mobil Oil Corp. v.*  
2 *Superior Court* (Cal. App. 2d Dist. Mar. 8, 1978), 79 Cal. App. 3d 486.  
3  
4  
5

6 **CONCLUSION**  
7

8 Without proof of a chargeable “communication” and without proof that  
9 Silverstein was a debt collector, judgment must be entered in favor of Silverstein  
10

11 Since it was an exhibit to the Unlawful Detainer action, judgment has to be  
12 rendered in favor of Silverstein and against Bea. .  
13  
14  
15

16 LARRY ROTHMAN AND ASSOCIATES  
17

18 DATED: November 9, 2018.  
19

20 S/LARRY ROTHMAN  
21 LARRY ROTHMAN,  
22 Attorney for the Defendant:  
23 SILVERSTEIN EVICTION LAW OFFICES  
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**CERTIFICATE OF SERVICE- PROOF OF SERVICE**

State of California, County of Orange:

I am employed in the county and state aforesaid. I am over the age of 18 and not a party to the within action; my business address is: 160 South Old Springs Road, Suite 170 Anaheim Hills, California 92808

On November 9, 2018, I served the foregoing document described as

**TRIAL BRIEF**

on the parties listed below in this action as follows:

☒ **BY ELECTRONIC MAIL.** I caused the above document to be electronically mailed through the ECF system of the United States District Court. Executed on November 9, 2018, at Anaheim Hills California.

☐ **BY ELECTRONIC MAIL.** I caused the above document to be electronically sent to the above-referenced opposing party or his/her/its counsel to the above referenced email address.

☐ **BY FACSIMILE.** I caused the above referenced document to be sent by facsimile to the above-referenced opposing party or his/her/its counsel to the at the above referenced facsimile number

☐ **BY PERSONAL DELIVERY.** I caused the above referenced document to be delivered to the above-referenced opposing party or his/her/its counsel at the above address.

☐ **BY FIRST CLASS MAIL.** . I caused the above referenced document to be sent by First Class Mail – postage paid to the above-referenced opposing party or his/her/its counsel at the above address.

☒ **FEDERAL.** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

1 [ ] **STATE OF CALIFORNIA.** I declare that I am employed in the  
2 office of a member of the bar of this court at whose direction the service was made.  
3

4 I declare under penalty of perjury under the laws of United States  
5 and the State of California that the above is true and correct.  
6

7 S/LARRY ROTHMAN  
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LARRY ROTHMAN  
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